Supreme Court, U.S.
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No. 00-346

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, Administratrix of the Estate of
CHRISTOPHER GARRIS, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is there (or should there be) a general maritime law cause of action for wrongful death that includes liability premised on negligence?

LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this case except E.T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and it participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from the action, with prejudice, on May 1, 2000.

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STATEMENT OF THE CASE

In April of 1997, Christopher Garris ("Garris"), age 21, (the son of Respondent, Celestine Garris) was employed by Tidewater Temps, Inc. and was working for Mid-Atlantic Coatings ("Mid-Atlantic"), a company in the business of sandblasting and cleaning ships' hulls and holds. On the night of April 8, 1997, Garris was working on board the USNS MAJ. STEPHEN W. PLESS at Pier 11 at the Norfolk Shipbuilding & Drydock Corporation ("Norshipco"), while the vessel was berthed in the navigable waters of the United States. On that night, Mid-Atlantic was working pursuant to a contract with Norshipco for repairs to the ship. At approximately 10:20 p.m., Garris was asked by his supervisor to climb to the top of a reserve sand hopper silo, a structure approximately thirty feet above the deck of the ship that held and funneled sand for use in sandblasting operations. The silo needed to be refilled with sand and a crane was used to raise a container full of sand up to the silo. Once atop the reserve silo, Garris was to throw a hand operated lever on the container that would allow the sand to flow out of the container and into the silo. As a result of a poor communication signaling system that was directed by Norshipco, and as a result of the negligence of a crane operator employed by E.T. Gresham, Inc. ("Gresham"), Garris was knocked off the silo by the crane and he fell to his death on the deck of the ship.

Because Garris was engaged in maritime employment and was working on navigable waters, he was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA"), and consequently, his parents received a funeral expense benefit. While the LHWCA § 905(b) specifically provides for an employee's cause of action against "a vessel," this is not such a case, but instead is an action under the general maritime law against other contractors working aboard the vessel. Garris has no statutory cause of action under the LHWCA against Norshipco or Gresham.

Celestine Garris brought suit in the United States District Court for the Eastern District of Virginia against Norshipco and Gresham seeking recovery for the wrongful death of her son based upon negligence under general maritime law and the Virginia wrongful death statute, Va. Code Ann. § 8.01-50. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

The district court's dismissal of the wrongful death negligence action under general maritime law was based on its conclusion that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) did not create a general maritime cause of action for wrongful death caused by negligence. The Fourth Circuit agreed but nonetheless reversed the district court's dismissal after deciding to extend *Moragne* to recognize such a cause of action explaining that

> [b]ecause the creation of a negligence-based wrongful death action is consistent with the principles of uniformity and consistency that formed the basis for *Moragne*, and because Congress has not affirmatively precluded a negligence-based wrongful death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.

App. F (21a-49a), *Garris v. Norfolk Shipbuilding & Drydock Co.*, 210 F.3d 209, 219 (4th Cir. 2000). In a concurring opinion,

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1. The district court dismissed with prejudice the general maritime law wrongful death claim. The district court did not exercise supplemental jurisdiction over the state wrongful death action and dismissed the state law claim without prejudice. Celestine Garris thereafter filed the state wrongful death action in state court only against Gresham. That action has since been dismissed by the state court on the ground that Gresham's crane operator was the "borrowed servant" of Norshipco.

a member of the panel agreed with the judgment but argued that *Moragne* need not be extended in order to create such a cause of action because "*Moragne* itself created a cause of action for negligence-based wrongful death." (App. 50a-61a). *Id.* at 223 (Hall, J., concurring).

SUMMARY OF ARGUMENT

When this Court recognized a general maritime wrongful death action for death caused by violation of maritime duties in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), it expressly overruled the *The Harrisburg*, 119 U.S. 199 (1886) which had held that there was no cause of action for wrongful death under maritime law. *The Harrisburg* involved a claim for *negligence-based* wrongful death by the family of a seaman killed when two vessels collided off the coast of Massachusetts. If, as Norshipco contends, the *Moragne* Court meant to limit the wrongful death action it created to unseaworthiness-based claims, there was no reason for the Court to overturn an eighty-four year old precedent and no reason to use the plural form in referring to "violation of maritime duties." The duty to not act negligently has been recognized as a maritime duty at least since this Court's decision in *Leathers v. Blessing*, 105 U.S. 626 (1882).

In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), the unanimous opinion of this Court assumed the existence of a *Moragne* negligence-based wrongful death action under the general maritime law. There the Court was asked to decide if such an action displaced state wrongful death remedies within state territorial waters. The Court concluded it did not, at least where the decedent was not a "seafarer." The *Yamaha* Court observed that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is 'for death caused by violation of maritime duties.' " *Id.* at 214 n.11. The Court then identified "negligence" as one of those duties citing *Kermarec v.*

Compagnie Generale Transatlantique, 358 U.S. 625 (1959). *Id.*

The Circuits that have addressed this issue have overwhelmingly concluded that *Moragne* either created a negligence-based wrongful death action or that *Moragne* should be extended to create such a cause of action. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993); *Garris v. Norshipco*, 210 F.3d 209, 222 (4th Cir. 2000); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421, 1427 (11th Cir. 1997). Norshipco can point to only two circuit court cases in support of its argument that *Moragne* is limited to claims based on unseaworthiness. *See Ivy v. Security Barge Lines*, 606 F.2d 524 (5th Cir. 1979) and *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982). Both cases no longer appear to be good law in their respective circuits as more recent cases in both the Fifth and Eleventh Circuits recognize a *Moragne* cause of action premised on negligence. *See Miles*, 882 F.2d at 985 and *In re Amtrak*, 121 F.3d at 1427.

There is unquestionably a cause of action for negligence under the general maritime law and there is no legal, equitable or policy reason why there should be no federal remedy under general maritime law where that same negligence results in death. To the extent such a distinction exists under federal admiralty law it exists due to the misguided 1886 decision in *The Harrisburg* which the *Moragne* Court described as "dubious even when rendered." *Moragne*, 398 U.S. at 378. This Court has since refused to create distinctions within the general federal maritime law based on whether an accident is fatal or nonfatal. *See Am. Export Lines v. Alvez*, 446 U.S. 274, 281 (1980) ("general federal maritime law is a source of relief for a longshoreman's personal injury, . . . just as it is a source of remedy for wrongful death").

If the remedy for wrongful death of maritime workers within state waters is left to the states, as Norshipco proposes, then state law tort concepts such as the "all or nothing" bar of contributory negligence, assumption of risk, broader "statutory employer" immunity, and differing standards of care for invitees, licensees, etc., will become part of federal admiralty law even though these concepts have been specifically rejected by this Court and by Congress as violative of federal maritime policy. *See The Max Morris v. Curry*, 137 U.S. 1 (1890); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). *See also* Section IV of this Brief (reviewing legislative history of the LHWCA and the Death on the High Seas Act, 46 U.S.C. §§ 761, *et seq.* ("DOHSA").

Norshipco's argument that respect for state sovereignty prohibits recognition of a negligence-based wrongful death action under the general maritime law is really a smokescreen. Norshipco is really only interested in one very discrete difference between Virginia law and federal law. While speaking in grand terms of protecting the "States' powers to protect their citizens by delineating remedies for tortious conduct causing death within state borders" (Norshipco Brief at p. 10), Norshipco's only specific complaint is that Virginia's broader "statutory employer" immunity will not apply to bar Garris's claim if general maritime law applies.[2] This Court has already concluded that Virginia tort law concepts such as contributory negligence, assumption of risk, varying standards of care based on a plaintiff's status as an invitee, licensee, etc., are contrary to fundamental features of federal maritime law and cannot be applied in admiralty cases. Moreover, the Virginia Supreme Court has itself held that the Virginia "statutory employer" immunity cannot be applied to prejudice rights under federal

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2. Unlike the broad immunity granted under the VWCA, the "statutory employer" immunity afforded by the LHWCA would not bar Garris's claim.

maritime law. *See Mizenko v. Electric Motor & Contracting Co.*, 244 Va. 152, 419 S.E.2d 637 (1992). Norshipco points to no other feature of Virginia law that it contends must be applied to claims within federal admiralty jurisdiction in order to avoid "trumping" of states' rights.

Norshipco's argument that the 1972 amendments to the LHWCA did away entirely with the *Moragne* cause of action is refuted by both the language of the statute and the legislative history of those amendments. Congress clearly retained the right of maritime workers to pursue negligence claims against third parties. If, as Garris contends, *Moragne* itself created a negligence-based wrongful death action then this action was specifically preserved by Congress when the 1972 amendments were passed. If, as Norshipco contends, *Moragne* did not recognize a negligence-based wrongful death action, neither the 1972 amendments nor the legislative history of the amendments evinces any hostility toward recognition of such an action.

As with the 1972 amendments to the LHWCA, DOHSA and its legislative history do not demonstrate any intent by Congress to preempt this Court's historical power and obligation to supplement the DOHSA remedies where doing so will promote the goal of uniformity in the administration of federal maritime law. Norshipco's argument to the contrary seems to have been raised and rejected like clockwork every ten years. *See Moragne*, 398 U.S. at 402 (1970); *Am. Export Lines*, 446 U.S. at 282-84 (1980); *Miles v. Apex Marine Corp.*, 498 U.S. at 27 (1990); *Garris*, 210 F.3d 209 at 221-22 (4th Cir. 2000) (App. 29a-31a).

ARGUMENT

I.

MORAGNE CREATED A GENERAL MARITIME CAUSE OF ACTION FOR WRONGFUL DEATH THAT IS NOT LIMITED TO LIABILITY PREMISED ON BREACH OF THE DUTY OF SEAWORTHINESS.

Norshipco contends that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) created a very limited federal cause of action for wrongful death caused by an unseaworthy condition aboard a vessel and that its holding was overturned two years later by the 1972 amendments to the LHWCA (the "1972 Amendments"). Brief of Norshipco at 15, 16 n.7. In light of the hundreds of cases that have interpreted, applied or referred to *Moragne* since 1972 (including several opinions of this Court[3]), Norshipco's argument makes up for in simplicity what it lacks in accuracy. Norshipco is simply wrong on both fronts.[4]

A. *The Harrisburg* and *Moragne* decisions.

Like Christopher Garris, Edward Moragne was a longshoreman who was killed aboard a vessel in United States and state territorial waters. His widow brought a wrongful death suit in Florida state court against the shipowner alleging Moragne's death was caused by the shipowner's negligence and by an unseaworthy condition of the vessel. Based on diversity of citizenship, the vessel owner removed the case to federal district court and sought dismissal of the

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3. Aside from the dissenting opinion of Judge Widener to the Fourth Circuit's denial of rehearing *en banc*, Norshipco does not cite to a single case holding (or commentator who concludes) that the 1972 amendments to the LHWCA overturned any negligence-based maritime cause of action.

4. Norshipco's argument that *Moragne* was overturned by the 1972 Amendments is addressed in section IV.A. of this Brief.

unseaworthiness claim. The District Court dismissed the unseaworthiness portion of the complaint on the ground that neither federal nor Florida's wrongful death statute allowed a wrongful death action premised on unseaworthiness in state territorial waters. *Moragne*, 398 U.S. at 376. The District Court relied on *The Harrisburg*, 119 U.S. 199 (1886) which held that maritime law does not recognize a cause of action for wrongful death.

The Harrisburg involved a ***negligence*** action brought against the steamer HARRISBURG by the widow and child of an officer of the schooner MARIETTA TILTON who died when the two vessels collided in Nantucket Sound. The District Court entered judgment for the widow and child holding that "in the admiralty courts of the United States the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed, under the general maritime law." *Id.* at 200. On appeal the Supreme Court reviewed the judicial decisions of the lower courts (which overwhelmingly had recognized such a cause of action) and then held that no such cause of action existed in admiralty because such actions were not part of the common law or the maritime law, as accepted and received from maritime nations generally. *Id.* at 213.

This Court's opinion in *Moragne* overturned *The Harrisburg* describing the opinion as "somewhat dubious even when rendered" and concluding that it was "such an unjustifiable anomaly in the present maritime law that it should no longer be followed." *Moragne*, *supra*, at 378. However, the *Moragne* opinion takes great pains to stress the importance of *stare decisis* noting that longstanding precedent should not be lightly overruled. *Id.* at 403. However, nothwithstanding the *stare decisis* concerns, the *Moragne* Court held as follows: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409.

Given the *Moragne* Court's extended exposition on *stare decisis* principles it bears repeating that *The Harrisburg* was a wrongful death claim premised on negligence. Norshipco's (and the Fourth Circuit's) overly technical reading of *Moragne* is difficult to reconcile with the uniformity goals announced in the opinion as well as the fact that after paying homage to the principle of *stare decisis*, the Court expressly overturned an 84 year old Supreme Court precedent. If the *Moragne* Court meant to limit the wrongful death action it was creating to claims based solely on unseaworthiness, there was no reason to overturn *The Harrisburg* and there was no reason for the Court to hold "that an action does lie under general maritime law for death caused by violation of maritime duties." *Moragne*, 398 U.S. at 409.[5]

At least since the decision in *Leathers v. Blessings*, 105 U.S. 626 (1881), this Court has recognized a general negligence cause of action for personal injury under federal maritime law. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001). In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413-14 (1953), the Court stated: "the fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence." The *Pope* Court went on to cite a

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5. This Court has already rejected a similarly hyper-technical reading of *Moragne*. In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990) the court observed:

> There is also little question that *Moragne* intended to create a general wrongful maritime wrongful death action applicable beyond the situation of longshoremen. For one thing, *Moragne* explicitly overruled *The Harrisburg*. *The Harrisburg* involved a true seaman. . . . If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.

long list of cases which illustrate "the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully transacting business on ships can recover for damages due to shipowners' negligence." *Id.* at 414 n.6. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Yamaha*, 516 U.S at 214 n.11. Thus, the exercise of due care or the duty to not act negligently has been recognized as a "maritime duty" for at least 120 years.

In support of its decision to overrule *The Harrisburg*, the *Moragne* court identified three anomalies created by *The Harrisburg:*

> The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

Moragne, 398 U.S. at 395. While the other two anomalies referenced in the *Moragne* opinion are specific to claims based on unseaworthiness, this first anomaly would continue to exist under Norshipco's reading of *Moragne*.

Norshipco must acknowledge that negligent conduct is actionable under the general maritime law if the maritime worker is merely injured. *See Leathers v. Blessings*, 105 U.S. 626, 630 (1882). However, Norshipco contends that identical negligent conduct has no *federal* remedy if it results in the death of the maritime worker within state waters. Norshipco contends that state wrongful death statutes provide a sufficient remedy.[6] But

6. After *Yamaha* it appears that Garris is a "seafarer" and as such he cannot bring a state wrongful death action. *See* Section III.B. of this Brief.

the application of broader state "statutory employer" immunity or the "all or nothing" contributory negligence rule will often mean that there is no remedy for the worker's death. Thus, the first anomaly described in *Moragne* continues to exist if there is no negligence-based wrongful death action under the general maritime law.

B. Post-*Moragne* Supreme Court decisions.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990), the Court noted that *Moragne* "overruled *The Harrisburg* and created a general maritime wrongful death cause of action." In addition, the *Miles* Court understood *Moragne* to have extended DOHSA's wrongful death action to territorial waters in order to further uniformity in the exercise of admiralty jurisdiction. *Miles*, *supra*, at 29-30. DOHSA provides a wrongful death action based on both negligence and unseaworthiness. *See* 46 U.S.C § 761. *See also Strehle v. United States*, 860 F. Supp. 136, 139 (S.D.N.Y. 1994), *aff'd*, 54 F.3d 765 (2d Cir. 1995). In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996), this Court recognized that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for 'death caused by violation of maritime duties.' "

In *Yamaha*, this Court assumed the existence of a general maritime negligence-based wrongful death action. In *Yamaha*, twelve-year-old Natalie Calhoun was killed in a jet ski accident at a beach in Puerto Rico. Her parents brought a **negligence-based** wrongful death action under state law against the jet ski manufacturer. The jet ski manufacturer argued that because the accident occurred on navigable waters, state remedies were displaced by the federal maritime wrongful death action recognized in *Moragne*. This Court disagreed holding that the *Moragne* wrongful death claim does not supply the exclusive remedy in cases involving the deaths of "nonseafarers" in territorial waters. *Id.* at 216.

Essential to the discussion and holding in *Yamaha* is the existence of a general maritime negligence-based wrongful death action that might arguably displace state law remedies. If, as Norshipco contends, no such cause of action exists under general maritime law then *Yamaha* is meaningless because the federal claim that the Court found did not preempt state law remedies does not exist to begin with.[7] In fact, *Yamaha* seems to go beyond merely assuming the existence of a negligence based *Moragne* action. The Court pointed out that:

> While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for "death caused by violation of maritime duties. *Id.* at 409. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) (maritime law incorporates strict product liability); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (negligence). *See also* G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975).

Id. at 214 n.11. Gilmore and Black state in their treatise that "it clearly follow[ed]" from *Moragne* that "[T]he *Moragne* remedy . . . provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 368 (2d ed. 1975). *See also* 8 *Benedict on Admiralty*, § 5.04[A][1][c] ("To fill the gap left by DOHSA with respect to deaths caused by conduct within territorial waters, a general maritime law wrongful death remedy was created by the Supreme Court in *Moragne*, under which the action may be based on negligence or unseaworthiness."); Steven F. Friedell, *Searching for a Compass:*

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7. The *Yamaha* opinion makes this same point in a slightly different context. There the Court stated "If *Moragne*'s wrongful death action did not extend to nonseafarers like Natalie, one could hardly argue that *Moragne* displaced the state law remedies the Calhouns seek." *Yamaha*, 516 U.S. at 210 n.7.

Federal and State Law Making Authority in Admiralty, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence.").

C. Post-*Moragne* decisions of the courts of appeals.

1. *The Second and Fifth Circuit Courts of Appeals have held that Moragne recognized a general maritime cause of action for wrongful death that includes negligence-based claims.*

The Second and Fifth Circuits (and the Texas Supreme Court[8]) have held that *Moragne* created a wrongful death cause of action premised on both negligence and unseaworthiness. *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993) ("In fashioning the remedy, however, the Supreme Court [in *Moragne*] did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law."); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

Notwithstanding an earlier decision in *Ivy v. Security Barge Lines*, 606 F.2d 524, 527 (5th Cir. 1979) (holding that *Moragne* only created a general maritime cause of action for wrongful death based on unseaworthiness), the more recent Fifth Circuit decision in *Miles* held that *Moragne* "recognized a wrongful death action for negligence and unseaworthiness under general maritime law." *See Miles*, 882 F.2d at 985.[9] This Court's opinion

8. *General Chemical Corporation v. De La Lastra*, 852 S.W.2d 915 (Tex. 1993).

9. Also, prior to *Ivy* the Fifth Circuit assumed the existence of a *Moragne* cause of action for wrongful death premised on negligence in

(Cont'd)

upholding the Fifth Circuit's decision in *Miles*, while not expressly addressing the above-quoted sentence in the Fifth Circuit's opinion, strongly supports the conclusion that the wrongful death action recognized in *Moragne* is not limited to liability premised on unseaworthiness.

This Court's affirmance in *Miles* pointed to the unanimous enactment of state wrongful death statutes, The Jones Act, and DOHSA (all of which impose liability primarily on the basis of negligence) as having "established an unambiguous policy in abrogation of those principals that underlay *The Harrisburg* [which denied a general maritime wrongful death claim premised on negligence]. Such a policy is 'to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.' " *Miles*, 498 U.S. at 23-24 (quoting *Moragne*, 398 U.S. at 391). The *Miles* Court went on to say that "the unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action." *Id.* at 24.

This Court's opinion in *Miles* said nothing that would even hint that the general maritime wrongful death action recognized in *Moragne*, which embodied the "unanimous legislative judgment" of state and federal legislatures recognizing **negligence-based** wrongful death recoveries, was to be limited only to actions premised on the theory of unseaworthiness. *See also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996).

(Cont'd)
Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 842, 846 (5th Cir. 1978) and in *Law v. Sea Drilling Corp.*, 523 F.2d 793, 798 (5th Cir. 1975) ("No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a court, or DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters — any navigable waters — and it can be enforced in any court.")

Respondent contends that in light of *Miles* (and *Yamaha*), the decision in *Ivy v. Security Barge Lines, Inc.* 606 F.2d 524 (5th Cir. 1979) is no longer good law in the Fifth Circuit to the extent it can be read as restricting the wrongful death action to liability premised on unseaworthiness. Moreover, as the concurring opinion in *Garris* points out, the majority opinion in *Ivy* was premised on a concern that the plaintiff might obtain inconsistent double recoveries for the same injury under *Moragne* and the Jones Act. App. F (58a n.4). No such concern exists in this case as Garris has no wrongful death action available under the Jones Act, the LHWCA and possibly no action under the Virginia wrongful death statute.[10]

2. *The Fourth and Ninth Circuits have held that Moragne should be extended to recognize a wrongful death action based on negligence.*

The Fourth and Ninth Circuits have held that while *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness, *Moragne* should be extended so as to recognize a negligence-based wrongful death action under general maritime law. *Garris v. Norshipco*, App. F (21a-49a), 210 F.3d 209, 211 (4th Cir. 2000); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). Whether the Second, Fourth, Fifth and Ninth Circuits (and the Texas Supreme Court) arrive at their conclusion by extending *Moragne* or by simply applying *Moragne*, the result is the same — there is a general maritime cause of action for wrongful death caused by negligence.

3. *The Eleventh Circuit has recognized a negligence-based Moragne cause of action.*

Norshipco cites *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982) for the proposition that there is no *Moragne*

10. *See* Section III.B. of this Brief.

cause of action for wrongful death premised on negligence.[11] As the concurring opinion in *Garris* explained, in *Ford*, the Eleventh Circuit held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." App. F (57a). In *Ford* the court held that "at least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity." *Id.* at 716. Unlike the present case, in *Ford* DOHSA provided plaintiff with a statutory wrongful death remedy.

More recently, and following *Yamaha*, the Eleventh Circuit has recognized that the *Moragne* cause of action is available where liability is premised on negligence. *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997) involved negligence claims arising out of the derailment of an Amtrak passenger train as it passed over a bridge spanning navigable waters in Alabama. Minutes before the train began crossing the bridge a tugboat ran into the bridge causing a portion of the railroad track to become misaligned. "Three locomotives, two passenger coaches, a crew dormitory car and a baggage car tumbled into the bayou, resulting in the deaths of forty seven persons on the train, numerous personal injuries and extensive property damage to the train and bridge." *Id.* at 1423. The district court, relying on *Yamaha*, determined that the wrongful death claims were governed by the Alabama wrongful death statute and not general maritime law. This determination by the district court was the main question presented on appeal. *Id.*

In analyzing this question the Court identified several substantial conflicts between the Alabama wrongful death

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11. Norshipco also cites to *Brown v. Brown*, 226 Va. 320, 327, 309 S.E.2d 586, 590 (1983), where Virginia Supreme Court held that "even after *Moragne*, there is no federal cause of action for the death of nonseamen in state territorial waters occasioned by negligence." (footnote omitted)

statute and substantive admiralty law including that federal maritime law requires that individual fault among tortfeasors be apportioned in collision and allision cases whereas under Alabama law apportionment of damages among joint tortfeasors is strictly forbidden. *Id.* The Court then noted that "[i]n sharp contrast to *Yamaha*, which was a products liability action arising from a recreational jet ski accident, the present action bears a substantial connection with traditional maritime activity." *Id.* at 1426. The Court found that:

> Embodied within the district court's reasoning is the assumption that *Yamaha*, by allowing state law remedies in that case, implicitly accepted as a necessary byproduct of its holding: that state wrongful death schemes would conflict with the general maritime law which ultimately must yield to state interests. The district court's interpretation of *Yamaha* is mistaken.

Id. at 1424 (footnote omitted). The Court further noted that *Yamaha*:

> [D]id not intend to wholly sacrifice long-standing admiralty principles at the altar of states' rights. To the contrary, in *Yamaha* the Court confined its holding "to the modest question whether it was *Moragne's* design to terminate recourse to state remedies," *id.* at 210 n. 8, but in answering that question in the negative, repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies, *id.* at 215 n. 13 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959)), such that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at 210 n. 8 (quoting *Romero*, 358 U.S. at 373).

Id. at 1424. The Court then concluded that the district court erred in applying the Alabama wrongful death statute to the wrongful deaths in the action and held that: "The plaintiffs in the wrongful death actions have available to them the remedies provided in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970)." *Id.*

II.

THE GOAL OF PROMOTING UNIFORMITY IN THE APPLICATION OF FEDERAL ADMIRALTY LAW SUPPORTS THE CONCLUSION THAT THE *MORAGNE* CAUSE OF ACTION INCLUDES NEGLIGENCE-BASED WRONGFUL DEATH ACTIONS.

Both the Constitution's grant of power in Article III, section 2, and the Judiciary Act of 1789, have been interpreted as giving the federal courts, in the absence of some controlling federal statute, the authority and obligation to develop a uniform substantive body of law applicable to cases within the admiralty and maritime jurisdiction. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920); *Moragne*, 398 U.S. at 401-02. The goal of promoting uniformity in federal admiralty law was the driving force behind the Court's decision in *Moragne*. *Offshore Logistics v. Tallentire*, 477 U.S. 207, 230 (1986). Aside from a misplaced desire to dredge up the wreckage of *The Harrisburg*, there is no legal, equitable or policy reason for general maritime negligence law to distinguish between fatal and non-fatal negligence claims. Such an unprincipled distinction will wreak havoc with the goal of promoting uniformity in the application of federal maritime law.

A. There is no logical reason for federal maritime law to distinguish between fatal and nonfatal injuries to maritime workers.

The odd distinction in maritime law between negligence resulting in death and negligence resulting in injury was created by *The Harrisburg* and existed up until the *Moragne* decision in 1970 (Norshipco contends it exists to this day). It spawned a confusing and often contradictory body of law as courts attempted to ameliorate the harshness of *The Harrisburg*, a decision that was "dubious even when rendered." *Moragne*, 398 U.S. at 378.[12] *See also Yamaha*, 516 U.S. at 206-07 and *Offshore Logistics*, 477 U.S. at 212 ("Unable to tolerate this archaism [the rule of *The Harrisburg*], some courts began to allow recovery for deaths within state territorial waters if an applicable state statute permitted such recovery"). The Court in *Moragne* believed that:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E.g., *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960). Such uniformity not only will further the concerns of both of the 1920 Acts [Jones Act, DOHSA] but also will give effect to the constitutionality based principle that federal admiralty law should be "a system of law coextensive

12. The *Moragne* court found the *The Harrisburg*'s conclusion that there was no common law action for wrongful death "was based upon a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all." *Id.* at 381.

> with, and operating uniformly in, the whole country." *The Lottawana*, 21 Wall. 558, 575, 22 L.Ed 654, 662 (1875).

Moragne, 398 U.S. at 401-02 (footnote omitted).

If Norshipco's position is accepted it will mean that the exact same parties, involved in the exact same maritime activities, in the exact same location (within federal admiralty jurisdiction), will be subject to either federal or state substantive law depending solely on whether the injured party lives or dies. This Court has confronted this issue before and concluded that there is no rational basis for general maritime law to distinguish between fatal and non-fatal injuries. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281 (1980) ("Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society").[13]

According to Norshipco, because Christopher Garris did not survive his fall his claim should be subject to the following complete defenses under Virginia law: (1) statutory employer immunity, (2) contributory negligence, and (3) assumption of risk. A shorter statute of limitations standard will apply to his claim under Virginia law and a different measure of damages will apply to his claim.[14] Had Christopher survived his fall, his

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13. The Court in *American Export Lines* also rejected this fatal/nonfatal distinction in another context when it observed that "if DOHSA does not pre-empt general maritime law where *fatalities* occur *within* territorial waters, it follows *a fortiori* that the Act does not exclude federal maritime law as a source of relief for *nonfatal* injuries upon the same waters". *Id.* at 282. The concurring opinion of Justice Powell in *American Export Lines* sums up the matter succinctly: "Because I see no rational basis for drawing a distinction between fatal and nonfatal injuries, I join in the judgment of the Court." *Id.* at 286.

14. Under *Moragne*, the estate of the deceased can recover damages for loss of support, services and society but not grief and (Cont'd)

negligence claim under the general maritime law would not be subject to any of these complete defenses or to the other less generous aspects of state law. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981); *Kermarec*, 358 U.S. at 628; *Pope & Talbot*, 346 U.S. at 409. *See also Yamaha*, 516 U.S. at 211-12.

In addition, according to Norshipco, had Christopher Garris been working aboard a ship in Portland, San Francisco, Houston, New Orleans or Miami, and fallen to his death under identical circumstances, his claim should rightly be subject to five different state tort law schemes. If uniformity is to continue to be a goal in the development of federal admiralty law then these types of inconsistencies should not be permitted by this Court.

There is simply no reason for this Court to perpetuate a distinction that arose due to a "dubious" 1886 opinion that itself "had little justification except in primitive English legal history — a history far removed form the American law of remedies for maritime death." *Moragne*, 398 U.S. at 379. In analyzing *The Harrisburg* opinion and its reliance on the common law rule against wrongful death claims, the *Moragne* Court observed that:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious

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sorrow. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Under the Virginia Wrongful Death statute, grief and sorrow are recoverable. Va. Code Ann. § 8.01-52(1)-(4).

> enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous."

Moragne, 398 U.S. at 381.

B. The comparative negligence rule is a characteristic feature of maritime law that requires uniform application within admiralty jurisdiction.

Norshipco argues at p. 28 of its Brief that negligence is not a "characteristic feature" of admiralty law and therefore uniformity concerns do not support the recognition of a negligence-based wrongful death action under the general maritime law. This argument misses the mark for two reasons. First, as noted above, negligence has been actionable under the general maritime law since at least the *Blessing* decision in 1882. Second, the comparative negligence rule is a "characteristic feature" of the general maritime law of negligence and it is directly at odds with the "all or nothing" rule of contributory negligence" applied in Virginia and some other states.[15] *Moragne* specifically identified the comparative negligence rule as a peculiarly maritime concept:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida

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15. For example, North Carolina also adheres to the "all or nothing" rule of contributory negligence. *Bowden v. Bell*, 446 S.E.2d 816 (N.C. Ct. App. 1994). South Carolina and Texas have adopted a modified comparative negligence rule that bars the plaintiff from any recovery if his negligence was more than 50% responsible for his injuries. *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991); Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001, 33.012 (Vernon 2000). Oregon and Pennsylvania have adopted a different modified comparative negligence rule that bars a plaintiff's recovery if his negligence is greater than the combined fault of all other negligent actors. Or. Rev. Stat. § 18.470 (1999); Pa. CSA § 7102(a).

> Supreme Court ruled that the state wrongful death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as "unseaworthiness" **and the comparative negligence rule**.

Moragne, 398 U.S. at 402 n.15 (emphasis added). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953).

Virginia continues to apply the "all or nothing rule" of contributory negligence which, if applied to maritime claims in Virginia waters, will certainly not "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Moragne, supra*, at 401-02. On the contrary, if Norshipco's position is accepted, there will be a three mile coastal zone in which maritime torts resulting in death may be governed by a defense that was rejected as violative of fundamental maritime principles as far back as 1890. *See The Max Morris v. Curry*, 137 U.S. 1 (1890) (rejecting contributory negligence as bar to recovery in maritime personal injury cases).

At this late date there can be no dispute that the comparative negligence rule is a fundamental tenet of substantive maritime law. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981) (contributory negligence and assumption of risk are inapplicable under maritime law). *The Max Morris*, 137 U.S. at 14; *The Lackawanna*, 151 F. 499 (S.D.N.Y. 1907) (adopting comparative negligence standard in maritime personal injury cases); 6 U.S.C. § 688 (adopting comparative negligence standard for Jones Act claims); 46 U.S.C. §§ 761-768 (adopting comparative negligence standard for DOSHA claims); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (adopting pure comparative fault standard in cases of marine collision). *See generally Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941 (1983).

In *Yamaha* this Court noted that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." 516 U.S. at 210. The Court then cited as an example *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) and its holding that admiralty's comparative negligence rule barred application of the state contributory negligence rule. *Id.* at 210.

The legislative history of the 1972 amendments to the LHWCA support this conclusion. In describing the third-party action authorized by § 905(b), Committees of both the Senate and House stated:

> [T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that **the admiralty concept of comparative negligence**, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury.

H.R. Rep. No. 92-1441, (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4705 (emphasis added).

III.

FEDERALISM CONCERNS DO NOT JUSTIFY A REFUSAL TO RECOGNIZE A GENERAL MARITIME WRONGFUL DEATH ACTION BASED ON NEGLIGENCE.

A. Norshipco's argument that state law provides the only remedy to Garris is not an argument based on federalism concerns but a frontal attack on federal maritime jurisdiction.

1. *State law is not presumed supreme in state waters.*

Norshipco argues that recognition of a general maritime cause of action for wrongful death based on negligence "would trump Virginia's 'statutory employer' defense" and "impermissibly violate the state's right to regulate tortious conduct within state borders." Norshipco Brief at p. 23. This argument is based on an inverted view of what Justice Frankfurter referred to as "the highly intricate interplay" of federal and state competence within state waters. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959). *Yamaha* concluded that, at least for "nonseafarers," the *Moragne* cause of action did not preempt state wrongful death statutes within state waters. *Yamaha*, 516 U.S. at 216. Norshipco turns the *Yamaha* decision upside down when it argues that state wrongful death statutes, in effect, preempt general maritime law within state waters. It is not state law that enjoys presumptive supremacy in state waters. On the contrary, while state law is not automatically displaced within federal admiralty jurisdiction, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (Pennsylvania's contributory negligence doctrine could not be applied to injured

worker's negligence claim under general maritime law); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (DOHSA savings clause that allows wrongful death actions in state courts for death on the high seas did not allow states to apply their substantive state wrongful death laws in derogation of admiralty DOSHA remedies); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F. 2d 1019 (5th Cir. 1985) (state law giving economic loss damages was preempted by the general maritime law).

The LHWCA and the Virginia Worker's Compensation Act ("VWCA") have long overlapped each other in coverage,[16] however, the LHWCA has adopted a more restricted "statutory employer" immunity than the more generous immunity granted by the VWCA. This is not a "trumping" of state law. The state "statutory employer" immunity applies to state law claims whether under the VWCA, the Virginia Wrongful Death Statute, or general Virginia negligence law. *See Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir. 1986). The federal "statutory employer" immunity rule applies to federal claims under the LHWCA or general maritime negligence law. *See Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1579 n.2 (11th Cir. 1988); *Ward v. Norfolk Shipbuilding and Drydock Corp.*, 770 F. Supp. 1118 (E.D. Va. 1991); *Mizenko v. Electric Motor & Contracting*, 244 Va. 152, 419 S.E.2d 637 (1992).

Congress could have left it to the various states to define the scope of the statutory employer defense under the LHWCA, but instead it opted for a uniform federal standard.[17] Given this

16. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (endorsing overlapping coverage of state workers' compensation laws and the LHWCA).

17. In 1984, 33 U.S.C. § 905(a) was amended to make clear that a general contractor enjoys immunity from a third party suit for liability in tort only when the subcontractor-employer fails to secure compensation and the general contractor is forced to pay it. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 7-10 (3d ed. 2001).

clear Congressional pronouncement that federal maritime uniformity is more important than allowing a state to project its "statutory employer" immunity into cases brought under federal maritime law, this Court need not engage in any guesswork as to whether the Virginia or federal "statutory employer" immunity should apply to claims brought under the general maritime law.

2. *The Virginia Supreme Court has concluded that uniformity concerns bar the application of Virginia's statutory employer immunity to federal maritime actions.*

The Virginia Supreme Court is certainly mindful of issues affecting Virginia sovereignty. Yet, the Virginia Supreme Court has also concluded that the VWCA "statutory employer" immunity cannot bar claims brought under the general maritime law that would not be barred under the LHWCA. *See Mizenko v. Electric Motor & Contracting*, 244 Va. 152, 419 S.E.2d 637 (1992) ("we hold that there is no state interest present in this case which outweighs the need for uniformity in the application of the general maritime law"); *see also Hunter v. Virginia International Terminals, Inc.*, 244 Va. IX, 419 S.E.2d 654, 655 (1992) (based on an evaluation of the comparative state and federal interests as set forth in *Mizenko*, the Virginia Supreme Court held that a maritime worker's general maritime negligence claim for injuries suffered aboard a barge on navigable waters could not be barred by application of the VWCA).

3. *Application of Virginia tort law concepts to Garris' claim would violate fundamental features of the general maritime law.*

The longstanding differences between general maritime negligence law and state negligence law are many and significant. As noted above, Virginia has steadfastly maintained its rule that a plaintiff's contributory negligence, no matter how

slight, is a complete bar to recover,[18] while federal maritime law rejected this rule in favor of comparative negligence over one hundred years ago.[19] This Court has strongly criticized the unfair results produced by the "all or nothing" rule of contributory negligence and the equal division of damages rule. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 (1975); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

The law in Virginia (and several other states) also retain legal concepts such as assumption of risk, last clear chance, different standards of care depending on whether someone is an invitee or licensee, etc.[20] and several states have enacted caps on certain types of damages such as punitive damages.[21] Federal maritime negligence law has rejected these concepts.[22] Also,

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18. *Litchford v. Hancock*, 232 Va. 496, 352 S.E.2d 335 (1987) (negligence of parties may not be compared, and any negligence of plaintiff which is proximate cause of accident will bar recovery).

19. *See The Max Morris v. Curry*, 137 U.S. 1 (1890) (holding contributory negligence does not bar recovery, but only mitigates damages, under maritime law); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (adopting pure comparative fault standard).

20. *Cole v. Jenkins*, 34 F. Supp. 2d 381 (W.D. Va. 1998) (assumption of risk); *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998) (last clear chance); *Franconia Associates v. Clark*, 250 Va. 444, 463 S.E.2d 670 (1995) (different standards of care owed to invitees and licensees).

21. Va. Code Ann. § 8.01-38.1.

22. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 162-63 (1981); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *National Marine Serv. Inc. v. Petroleum Serv. Corp.*, 736 F.2d 272 (5th Cir. 1984) (rejecting assumption of risk as defense under maritime law); *Prudential Lines, Inc. v. McAllister Bros., Inc.*, 801 F.2d 616 (2d Cir. 1986) (rejecting last clear chance doctrine as a defense under maritime law); *Kermarec v. Compagnie Gernerale* (Cont'd)

Virginia has a two year statute of limitations period for negligence and wrongful death actions and Congress has adopted a uniform three year statute of limitations period for all personal injury claims arising out of a maritime tort.[23] These differences affect a far greater number of cases than the cases involving Virginia's "statutory employer" immunity. It is clear that none of these state tort law concepts can be applied to federal maritime claims. Yet, Norshipco does not complain of this "trumping" of state law.

Such differences between state and federal law do not represent "violations of a state's right to regulate tortious conduct within state borders," (Norshipco Brief at p. 23) they merely reflect the fact that Congress and the federal courts are tasked by the Constitution to develop a uniform body of federal maritime law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 456-57 (1925) (state statute preempted where its application would interfere with commonly accepted maritime principle of comparative negligence). These differences also evidence a strong difference of opinion as to basic tenets of substantive tort law. Yet notwithstanding the obligation of Congress and the Federal Courts to develop a uniform body of federal admiralty law, Norshipco contends that these fundamental principles of substantive federal maritime law should give way to "the collective judgment of the 140-member General Assembly of Virginia." Norshipco Brief at p. 41.

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Transatlantique, 358 U.S. 625 (1959) (adopting uniform duty of care standard owed to persons lawfully aboard a vessel). As for punitive damages, one commentator has observed that "since punitive damages in admiralty are a matter of federal maritime law, state tort reforms do not affect admiralty punitive damage awards." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-17 p. 228.

23. 46 U.S.C. § 763(a) (uniform three-year statute of limitations for marine torts).

Notwithstanding Norshipco's exaggerated warnings of violations of state sovereignty, since at least the *Blessing* decision in 1882 there has been this interplay between state and federal maritime tort law and a second Civil War has not yet erupted.

4. *Norshipco cloaks its result-oriented argument under the guise of federalism.*

For all of Norshipco's sound and fury concerning states' rights, it is really only concerned with the difference between federal and Virginia law as to the scope of "statutory employer" immunity. However, given Congress's clear direction on this issue, no matter what this Court decides, the "statutory employer" immunity of the LHWCA will continue to preempt the VWCA's "statutory employer" immunity within federal admiralty jurisdiction. *See Ward*, 770 F. Supp. at 1121 and *Mizenko*, 419 S.E.2d at 640-44. If Norshipco really means what it says about the paramount importance of protecting a state's right to regulate tortious conduct within its borders then provisions of the LHWCA and 120 years of maritime negligence law must be swept aside to avoid "violations" of state tort law. Norshipco's brief is careful not to ask so much, but there is no logical reason why the many above-described "violations" of Virginia's sovereignty should be any more palatable to Norshipco than the non-application of Virginia's "statutory employer" immunity for deaths caused by negligence in state waters.

On the other hand, if, as Garris suspects, Norshipco's concern for states' rights is limited to insuring the application of Virginia's broader "statutory employer" immunity to bar recovery in this case, then it is really arguing for a particular result and not states' rights. Thus, it is Norshipco, and not the Fourth Circuit, that is guilty of "result-oriented" reasoning. *See* Brief of Norshipco at p. 27.

5. *Recognition of a negligence-based wrongful death action will not undermine state wrongful death statutes.*

Norshipco recognizes, as it must, the power of Congress and the Federal Courts to promote a uniform body of federal maritime law. Brief of Norshipco at p. 27. However, Norshipco argues that "creating a new tort-based cause of action for harbor workers in state territorial waters would upset settled and predictable state rules under which maritime employers currently operate." Brief of Norshipco at p. 40. As for the "settled and predictable" state of the law, this case has made its way to this Court on Norshipco's argument that there is a "schizophrenic three-way split in the federal courts concerning whether *Moragne* recognizes or should be extended to recognize a judge-made, wrongful death cause of action in negligence." Pet. for Writ of Cert. at p. 5.

As noted earlier, the Second, Fourth, Fifth, Ninth and Eleventh Circuits recognize a general maritime wrongful death action based on negligence. While Norshipco will no doubt point to the *Ivy* and *Ford* decisions as casting doubt on the position of the Fifth and Eleventh Circuits, Norshipco cannot point to any state or federal jurisdiction except the Commonwealth of Virginia[24] that unequivocally limits *Moragne* to unseaworthiness claims. Assuming the most recent cases in the Fifth, Fourth and Eleventh Circuits can be relied upon, a *Moragne* cause of action for negligence now exists in Washington, Oregon, California, Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, New York and Connecticut. These states represent the vast majority of the United States coastline and include the most active ports in the country. Norshipco does not explain how a decision by this Court that overturns the law in these jurisdictions better promotes predictability. In fact, the only predictable result of this Court

24. Of course, if the Fourth Circuit's decision in this case is upheld, the Virginia Supreme Court decision in *Brown v. Brown*, 226 Va. 320, 309 S.E.2d 586 (1983) will be overturned.

holding that there is no wrongful death action for negligence under the general maritime law, is that factually identical cases arising under federal maritime jurisdiction will be subject to as many different substantive state law tort schemes as there are states that include or border navigable waters.

Norshipco contends that recognition of a negligence-based general maritime wrongful death action will undermine state wrongful death statutes. Just the opposite is true. *Moragne* sought to give effect to the policies underlying the enactment of state wrongful death actions. In *Miles*, this Court recognized this goal of *Moragne* when it stated "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death statute." *Miles*, 498 U.S. at 24. Due to principles of uniformity and consistency necessary to the administration of federal maritime law, some minor inconsistencies will no doubt exist concerning the specifics of state wrongful death statutes and a general maritime wrongful death action. However, the overriding state policy of permitting a negligence-based cause of action for wrongful death is promoted by recognizing a general maritime negligence-based cause of action for wrongful death.

B. Following this Court's decision in *Yamaha* there may be no remedy under state wrongful death statutes for deaths of "seafarers".

Unmentioned in Norshipco's extended discourse on why state wrongful death statutes provide the sole remedy for workers like Christopher Garris who are killed in state waters, is the distinct possibility that in the wake of *Yamaha* only "non-seafarers" are permitted the application of state wrongful death statutes. In *Yamaha* this Court stated:

> Traditionally, state remedies have been applied in accident cases of this order — maritime wrongful death cases in which no federal statute specifies the

> appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in *Moragne*.

Yamaha, 398 U.S. at 202. It appears that Garris was a "seafarer" as defined by *Yamaha* as he was "a person otherwise engaged in a maritime trade" and he was covered by the LHWCA. *Id.* at 201, 205 n.2.

At least two cases have interpreted *Yamaha* as foreclosing "seafarers" from utilizing state wrongful death statutes. In *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-60 (9th Cir. 1997) the court found that Ghotra, a self-employed marine surveyor killed aboard a ship in navigable waters, was a "seafarer" within the meaning of *Yamaha* and therefore state wrongful death remedies were preempted by federal maritime law. In *Ghotra* the decedent's family could still bring a federal wrongful death action against the vessel under 33 U.S.C. § 905(b). Likewise, in *In re Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 972 F. Supp. 946 (E.D.N.C. 1997), the Court found that Bruce Spain, a self-employed commercial shrimper, was a "seafarer" and interpreted *Yamaha* as holding that state wrongful death statutes are available only when decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. *Id.* at 950. In *Goose Creek* the court assumed decedent's estate could bring a federal wrongful death action for negligence under *Moragne*. *Id.* at 949.

If this court concludes that *Moragne* is dead and that these cases correctly interpret *Yamaha*, then the wrongful deaths of workers' such as Christopher Garris have ***no*** legal remedy. This Court will have thus managed to not only refloat *The Harrisburg*, but to iron-clad its unjustifiable inequities. While perhaps not

directly before this Court, the issues of who is a "seafarer"[25] and whether a "seafarer" is entitled to rely on state wrongful death statutes are inextricably linked to the issue of the existence or nonexistence of a general maritime wrongful death action based on negligence.

To the extent maritime workers are covered by a federal wrongful death action (whether by statute or under *Moragne*), one might try to justify foreclosing their access to state wrongful death actions. However, given the reasoning of *Moragne* and *Yamaha*'s assumption that the *Moragne* cause of action for negligence remains part of the general maritime law, it is impossible to believe that this Court considered, much less approved of, the possibility that maritime workers would again be left without any remedy in cases of wrongful death within state waters. Accordingly, the *Yamaha* Court had to believe that the *Moragne* cause of action for negligence-based wrongful death was alive and well.[26]

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25. In both *Ghotra* and *Goose Creek* the plaintiffs argued that the deceased were not "seafarers" within the meaning of *Yamaha* because they were self-employed and therefore not covered by any federal "comprehensive tort recovery regime" — meaning that Ghotra had no employer to pay benefits under the LHWCA and Spain had no employer he could bring a Jones Act claim against. Both courts rejected this argument. *See Yamaha*, 516 U.S. at 216. However, in *In re Goose Creek Trawlers, Inc.: Wards of the Court? With Friends Like These, Who Needs Enemies? Exploring the Nature of the Yamaha Exception*, 22 Tul. Mar. L.J. 693 (Summer 1998), the author argues that these cases are wrongly decided and that the *Yamaha* Court "intended that state remedies (*i.e.*, nonpecuniary damages) should remain available to all individuals who are not covered by a comprehensive federal statutory scheme"). *Id.* at 701-02.

26. The opinion in *Miles* also refutes Norshipco's contention that the *Moragne* cause of action died as a result of the 1972 Amendments to the LHWCA. In refusing to limit *Moragne* to its facts the Court stated: "Were we to limit *Moragne* to its facts, that case would no longer

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IV.

THERE IS NO "SEPARATION OF POWERS" ISSUE INVOLVED WITH THE COURT'S RECOGNITION OF A GENERAL MARITIME WRONGFUL DEATH ACTION BASED ON NEGLIGENCE.

A. The 1972 Amendments to the LHWCA Did Not Sweep away the *Moragne* Cause of Action for Wrongful Death.

1. *The 1972 Amendments specifically preserved workers' right to bring negligence actions against third-parties.*

The "unbroken line of federal cases"[27] recognizing a maritime worker's right to bring negligence actions against third parties was not broken by the 1972 Amendments. In fact, it was specifically preserved in the amended statute. Section 933(a) provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

The use of the terms "some person other than the employer" and "third person" make clear that such claims are not limited to vessel owners. *See May v. Transworld Drilling Co.*, 786 F.2d 1261 (5th Cir. 1986) (1972 Amendments preserve injured

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have any applicability at all. In 1972, Congress amended the [LHWCA] to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness." 498 U.S. at 28.

27. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. at 414 n.6.

worker's preexisting right, under general maritime law, to recover for third-party negligence, but eliminates his right to bring actions against third parties based on unseaworthiness).

In *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1014 (1st Cir. 1985) the Court explained that:

> The maritime tort action for negligence was a feature of the common law of admiralty prior to *Sieracki-Ryan*, when one group of torts involving longshore workers, those committed on board a vessel lying in navigable waters, were excepted from the negligence standard and given strict liability treatment. Section 905(b) was enacted to bar this special treatment, and essentially returned the applicable law to its pre-*Sieracki* state, when negligence had to be proven to obtain damages from a vessel.

In *Ward v. Norshipco*, 770 F. Supp. 1118 (E.D. Va. 1991), a case involving facts similar to this case, a temporary worker was injured while performing tank cleaning services aboard a U.S. Navy vessel and he filed suit against Norshipco, the contractor hired to perform repairs upon the vessel. Norshipco in turn filed a third-party against the subcontractor that obtained the temporary worker. Norshipco acknowledged that both the Virginia Workers' Compensation Act ("VWCA") and the LHWCA covered plaintiff but argued that despite this overlapping coverage, the VWCA "statutory employer" immunity should apply to bar an action against Norshipco.[28]

28. The VWCA provides a broader "statutory employer" immunity than the LHWCA. Under the VWCA a contractor is immune from suit by a subcontractor's employee provided the subcontractor was performing the "normal work" of the contractor. *See* Va. Code §§ 65.1-30, -31, -40. *Farish v. Courion Industries, Inc.*, 722 F.2d 74, 78-80 (4th Cir. 1983). Under the LHWCA a contractor can only take (Cont'd)

The Court held that the LHWCA's "statutory employer" immunity applied due to federal preemption principles and in reliance on *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953) in which the Court stated that "a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." *Ward*, 770 F. Supp. at 1121.

The *Ward* Court then turned to the question of whether plaintiff had a federal cause of action against Norshipco:

> The ultimate issue in this case, then, is whether Ward has a federal maritime cause of action against Norshipco. As *Garvin* holds, the LHWCA does not of itself create a cause of action in favor of an employee against a third party, unless the third party is a vessel. [*Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir. 1985)]; *see* 33 U.S.C. § 933. Ward therefore may not rely on the LHWCA to provide him with a cause of action against Norshipco. But simply because the LHWCA does not create such a cause of action does not mean such a cause of action does not exist under federal maritime law. . . .
>
> The question therefore becomes, in the absence of a federal statutory cause of action for negligence against a non-vessel third party, and in the absence of a Supreme Court case creating such a cause of action in the way *Moragne* created a federal maritime cause of action, does a federal maritime

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advantage of the "statutory employer" immunity if it actually pays benefits to the injured employee of the subcontractor due to the subcontractor's failure to secure the payment of compensation required by 33 U.S.C. § 904. *See* 33 U.S.C. § 933(I).

> cause of action exist for a harbor worker against a non-vessel third party? The court holds that such a cause of action does exist.

Id. at 1121. *See also Holland v. Sea-Land Service*, 655 F.2d 556, 559 (4th Cir. 1981) (the 1972 amendments specifically "preserves [the employee's] right under prior law to recover for third-party negligence"). *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 778 n.9 (11th Cir. 1984) (rather than creating a new cause of action, § 905(b) merely preserves certain preexisting remedies to injured workers against third parties). *See also Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981); *Solano v. Beilby*, 761 F.2d 1369 (9th Cir. 1985). A leading admiralty law commentator agrees with these cases:

> Section 905(b) permits third party actions by an injured longshore worker only for "injuries caused by the negligence of a vessel." If the employee is injured by a non-vessel third party, such as a terminal operator, section 905(b) is not applicable. However, the employee may bring a tort action against a non-vessel third party. If there is admiralty jurisdiction under traditional tests, the cause of action will lie under the general maritime law.

Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001).

2. ***The legislative history of the 1972 Amendments refutes Norshipco's argument that Congress intended to abrogate judge-made maritime negligence remedies.***

Norshipco's argument that the 1972 Amendments did away entirely with the *Moragne* cause of action is not supported by the language of those amendments or the legislative history concerning the amendments. The 1972 Amendments dealt with what one commentator called "the liability round robin" that

developed after this Court's opinions in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (3d ed. 2001).

When the LHWCA was passed in 1927, it created a no-fault compensation scheme for longshoreman and harbor workers and their employers. It also codified a cause of action for negligence by such workers against vessel owners. *See* 33 U.S.C. § 905(b). Later in *Sieracki*, 328 U.S. 85, the Supreme Court extended the warranty of seaworthiness to longshoreman who were aboard a ship doing seaman's work. Then, in *Ryan Stevedoring Co.*, 350 U.S. 124 (1956), the Supreme Court found an implied warranty of workmanlike performance running from the stevedore to the vessel owner. This set off the "liability 'round robin' whereby an injured longshoreman could recover damages for unseaworthiness from the shipowner, but the shipowner could proceed against the stevedore for indemnity because of breach of the implied warranty of workmanlike performance." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed., Vol. 1 at 434. The 1972 Amendments sought to eliminate this problem by abolishing the *Sieracki* cause of action for unseaworthiness against vessel owners *and* the indemnity action created by *Ryan* in favor of vessel owners against the stevedore. The 1972 Amendments did not address the liability of non-vessel third parties because they were not part of the problem Congress sought to correct.

The Senate and House Committee Reports on the amendments described the effect of the amendments as follows:

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of

his injury. The Supreme Court has ruled that ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. ***It continues to allow suits against vessels or other third parties for negligence.*** At the same time it raises benefits to a level

> commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

S. Rep. 92-1125, (emphasis added). In *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 n.41 (1981), this Court recognized that the amendments to the LHWCA left intact an employee's right to bring third-party actions.

In support of its argument that Congress intended by the 1972 Amendments of the LHWCA to do away with the *Moragne* remedy[29] and to limit "land based maritime workers to state law remedies," Norshipco quotes at two sections of its brief (pp. 22, 32) legislative history found in H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4703:

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, in so far as bringing a third-party action is concerned . . .

However, this language did not intend to limit maritime workers to state law remedies. Indeed just the opposite was intended.

The above Committee Report merely expressed the intent that the negligence action set forth in § 905(b) against the vessel, be it for death or injury,[30] is to be governed by land based principles of law, *see Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 n.13, 168 n.14 (1981), but not the particular law of the state where the accident or death occurred.

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29. It is worth noting that the *Moragne* cause of action for unseaworthiness is still available to seaman. *See Miles*, 498 U.S. at 30.

30. As noted previously, the § 905(b) remedy applies to both death and injury cases. *See* §§ 905(b) and 902(2).

In this same House Report (No. 92-1441), the following dispositive language appears:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

1972 U.S.C.C.A.N. at 4705. The language quoted above is also found in the Senate Committee Report, No. 92-1125, "Elimination of Unseaworthiness Remedy." In *Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933 (4th Cir. 1981), the court reviewed this legislative history and concluded:

> In short, the objective has been to avoid a situation in which a plaintiff would have a viable cause of action in Portland, Maine although, under exactly identical factual circumstances, he would be unable to recover in Portland, Oregon because of differences in the laws of the two states. That is not to say that the state's law might not constitute persuasive authority as to what the federal law should be.

Id. at 938-39.

Norshipco must acknowledge that the LHWCA provides longshoremen and harbor workers with a federal claim for injury and death against a vessel under § 905(b), and the general maritime law provides longshoremen and harbor workers with a federal negligence claim for injury against a non-vessel. However, Norshipco contends that the LHWCA should be read to bar a federal claim for death against a non-vessel. This argument finds no support in the language of the LHWCA and

is refuted by the legislative history of the 1972 Amendments. Aside from the historical anomaly created by *The Harrisburg*, there appears no reason why the death of a harbor worker caused by the negligence of a non-vessel third-party should be set apart and limited solely to state law remedies.

3. *The LHWCA evinces no hostility toward judge-made general maritime negligence actions.*

Norshipco's "separation of powers" argument is premised on its badly mistaken interpretation of the legislative history surrounding the 1972 Amendments. From its misreading of the legislative history, Norshipco proceeds to pronounce that "Congress expressed its intention in the legislative history of the 1972 Amendments that general judge-made admiralty remedies should not supplement the LHWCA or existing state law remedies." Norshipco Brief at p. 32. In fact, as noted above, Congress expressed the exact opposite intent with regard to negligence actions. *See* Section IV.A. of this Brief.

Norshipco is simply wrong when it contends that "Congress rejected in the LHWCA a uniform tort remedy for harbor workers killed in state waters and instead opted for a no-fault worker's compensation remedy that harbor workers could assert against their employers." Norshipco Brief at p. 31. Section 933(a) of the LHWCA makes clear that a worker does not have to elect between accepting statutory benefits and pursuing a third-party negligence action. In addition, § 905(b) provides longshoreman and harbor workers with a cause of action against third-party vessels for negligence resulting in injury or death.[31] There is nothing in the statute or the legislative history to support Norshipco's contention that Congress meant to carve out and abolish third-party actions against non-vessels for wrongful death.

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31. 33 U.S.C § 905(b) refers only to "injury" however "injury" is defined at § 902(2) to include death.

Even if Congress had remained silent as to whether third-party negligence actions survived the 1972 Amendments, Norshipco's argument would still fail. A similar argument was made and rejected in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975):

> Finally, the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 20 (1963) *See also Moragne v. United States Marine Lines*, 398 U.S. 375, 405 n.17 (1970); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-632 (1959).

Id. at 409. Also, in *Moragne* the Court noted: "There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States." *Moragne*, 398 U.S. at 396.

B. DOHSA does not demonstrate any Congressional intention to preempt judge-made general maritime negligence claims in state waters.

Norshipco next argues that because Congress, in enacting DOHSA, did not intend to preempt state wrongful death statutes within state waters, it follows that Congress meant to "reserve this area of law to the States." Norshipco Brief at p. 20. *Moragne* specifically rejected this very argument: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Moragne*,

398 U.S. at 402. In *American Export Lines, Inc. v. Alvez*, defendant also argued that DOHSA preempted general maritime law within state waters. The Court disagreed explaining:

> DOHSA comprehends relief for *fatal* injuries incurred on the *high seas*, 46 U.S.C. § 761. To be sure, *Mobil Oil Corp. v. Higginbotham* [436 U.S. 618 (1978)], construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But *Higginbotham* never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful deaths on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful deaths on territorial waters. 436 U.S. at 623-625; see *Moragne*, 398 U.S. at 397-398.

446 U.S. at 282.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) this Court echoed *Moragne's* conclusion that Congress in passing DOHSA [and the Jones Act], did not intend to foreclose the Supreme Court from "supplement[ing] these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must keep strictly within the limits imposed by Congress." *Id.* at 27. There, the defendant, Apex Marine, argued that because the decedent was a seaman and not a longshoreman like Moragne, the *Moragne* cause of action did not apply. The *Miles* Court stated: "Apex is correct that *Moragne* does not apply on its facts, but we decline to limit *Moragne* to its facts." *Id. Miles* reaffirmed the conclusion of the *Moragne* Court that "the extension of the DOHSA wrongful death action to territorial waters furthers, rather than hinders, uniformity in the exercise of admiralty

jurisdiction." *Id.* at 29-30. *See also* App. F (45a); *Garris v. Norfolk, Shipbuilding & Drydock Company, Inc.*, 210 F.3d 209, 221 (2000).

CONCLUSION

In 1865, Chief Justice Chase, while sitting as district judge in his circuit, recognized a wrongful death action based on negligence under the general maritime law stating: "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 F. Cas. 909, 910 (CC Md. 1865) (No. 12,578). In 1886, the Court in *The Harrisburg* failed to heed this humane and commonsensical advice and instead adopted a harsh, contorted and long since rejected legal rule barring such claims. This misguided decision led to eighty-four years of unnecessary confusion as the courts attempted to circumvent the harshness of the rule announced in *The Harrisburg*. Then, in 1970, in the "unanimous and carefully crafted" decision in *Moragne* (*Miles*, 498 U.S. at 29), this Court finally overturned *The Harrisburg* and adopted the reasoning of Chief Justice Chase. Most courts and commentators (including the Supreme Court, it would seem) believed that *Moragne* created (or should be extended to create) a general maritime cause of action for wrongful death. *See* cases and authorities cited in Sections I.B. and C. *infra*; *see also Yamaha*, 516 U.S. at 214 n.11.

This Court is now asked to pronounce *Moragne* dead and to return to the confused state of the law caused by *The Harrisburg*. This Court should decline this request and should instead state clearly and unequivocally that there is an action for wrongful death under the general maritime law and it encompasses not only unseaworthiness but all maritime duties, including negligence.

Respectfully submitted,

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